COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of DORIS L. SASSOWER,

Petitioner-Appellant,

-against-

A.D. #93-02925

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Dept., HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel respectively of the Grievance Committee for the Ninth Judicial District,

Respondent-Respondent.

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JURISDICTIONAL STATEMENT

1. The title of this case is set forth above.

2. This is an appeal to the Court of Appeals from a Decision, Order & Judgment of the Appellate Division, Second Department, dated September 20, 1993, [hereinafter "the Judgment"].

3. The Judgment, with Notice of Entry, was served upon Petitioner-Appellant [hereinafter "Appellant"] by mail on November 29, 1993 (Exhibit "A").

4. A Notice of Appeal from the Judgment was served and filed on January 3, 1994 (Exhibit "B").

5. By the Judgment appealed from, the Appellate Division, Second Department [hereinafter "Respondent Second Department"]:

(a) GRANTED the motion of its own attorney, the Attorney-General, to dismiss Appellant's CPLR Article 78 proceeding, which challenged as devoid of jurisdiction a disciplinary proceeding authorized by Respondent Second Department to be prosecuted against her under a February 6, 1990 Petition; and

(b) DENIED Appellant's Cross-Motion[1]:

(i) to stay prosecution of the February 6, 1990 Petition, as well as an unrelated disciplinary Petition dated January 28, 1993 and an unrelated March 25, 1993 Supplemental Petition, all authorized by Respondent Second Department under the same docket number as the February 6, 1990 Petition, A.D. #90-00315;

(ii) to recuse Respondent Second Department from adjudicating the Article 78 proceeding and to transfer it to another Judicial Department;

*(iii) to amend or supplement the Article 78 Petition to plead a pattern of harassing, abusive, and vindictively-motivated disciplinary proceedings, all without jurisdiction, including the procurement of a jurisdictionally-void June 14, 1991 interim suspension Order, as to which no hearing was afforded Appellant either before it was issued or since;

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1 The September 20, 1993 Judgment (Exhibit "A") omits from its recitation of the relief requested by the cross-motion those branches described herein at (iii), (v), and (vi), here highlighted by an asterisk.

(iv) to compel production of the July 31, 1989 Grievance Committee Report on which the February 6, 1990 Petition is allegedly based, the July 8, 1992 Grievance Committee Report on which the January 28, 1993 Petition is allegedly based, and the December 17, 1992 Report on which the March 25, 1993 Supplemental Petition is allegedly based; and for other discovery/disclosure pursuant to CPLR §408 and §3101(a);

*(v) for summary judgment in Appellant's favor pursuant to CPLR §3211(c); and

*(vi) for such other and further relief as may be proper, including costs and sanctions pursuant to 22 NYCRR §130-1.1, et seq.

6. The Judgment (Exhibit "A"), granting Respondents' motion to dismiss Appellant's Article 78 proceeding "on the merits" based upon the supposed availability of a remedy in the "underlying disciplinary proceeding" for her jurisdictional challenge and denying, without reasons, Appellant's Cross-Motion "in its entirety", failed to make any finding as to the threshold issue of Respondent Second Department's duty to recuse itself from a proceeding in which it was a party Respondent--although the issue was briefed in Appellant's Memorandum of Law, citing Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) and Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1985), in addition to Canons 3C(1)(a) and (c) of the Code of

Judicial Conduct[2]. Instead, Respondent Second Department rendered the Judgment by a five-judge panel, three of whose members--Justices Thompson, Sullivan, and Bracken--had themselves participated in <u>every</u> Order which the Article 78 proceeding sought to have reviewed--and a fourth member, Justice Balletta[3], who had participated in more than half of said Orders.

7. Annexed hereto as Exhibit "D" are copies of the aforesaid Orders of Respondent Second Department, which were exhibits to the Article 78 Petition and Cross-Motion or incorporated therein by reference, establishing the long-term participation of the aforesaid four panel members in the disciplinary proceedings under A.D. #90-00315. All said Orders are brought up for review in the instant appeal. When compared to the record, they document, for purposes of summary judgment, that branch of Appellant's Cross-Motion which sought to amend or supplement the Petition "so as to plead a pattern and course of harassing and abusive conduct by Respondents, acting without or in excess of jurisdiction". Said Orders, in addition to being jurisdictionally-void, are otherwise factually and legal unfounded, as the record under A.D. #90-00315 unequivocally

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2 The pertinent pages from Appellant's Memorandum of Law in Opposition to Respondents' Dismissal Motion and in Support of her Cross-Motion, dated July 19, 1993, are annexed hereto as Exhibit "C".

3 Justice Balletta had himself been the subject of a prior recusal motion by Appellant in an unrelated civil action to which she was a party, after he sat as an appellate judge in the case wherein he had participated as a lower court judge. Recusal and reargument, based on such undisclosed fact, were denied.

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8. The name and address of Respondents' attorney is the Attorney General of the State of New York, G. Oliver Koppell, 120 Broadway, New York, New York 10271.

BASIS OF COURT OF APPEALS JURISDICTION

9. Under CPLR §5601(b)(1), this Court has jurisdiction to entertain this appeal, taken as of right from a Judgment which finally determines a proceeding originating in the Appellate Division, where there is directly involved the construction of the state and federal Constitutions--in this case, the Fourteenth Amendment of the Constitution of the United States and Article 1, §6 and §11 of the Constitution of the State of New York, relating to due process and equal protection in the context of disciplinary jurisdiction exercised under Judiciary Law §90.

10. This is an appeal from a judgment in an Article 78 proceeding against a body or an officer, where the Appellate Division was exercising original jurisdiction. "In an Article 78 proceeding in which the Appellate Division has original jurisdiction... appeal lies to the Court of Appeals". 24 Carmody-Wait 2d, 145:410 (1992 ed.), 6 N.Y. Jur.2d 261. Respondent Second Department's exercise of original jurisdiction to adjudicate the Article 78 proceeding against it, notwithstanding it was legally and ethically precluded from doing so by reason of its actual and apparent bias, as herein detailed,

has effectively resulted in the denial of Appellant's right to first review by a fair and impartial tribunal. In such case, there must be a review de novo by this Court (Cf. CPLR §5501(b)), since otherwise Respondent Second Department would, by its Judgment of dismissal, have been not only judge and jury in its own case--to which it was a party--but also a court of first and last resort. Such would be contrary to the settled public policy of this State recognizing "the right of suitors to one appeal", 10 Carmody Wait 2d, §70:4 (1992 ed.).

11. Appellant showed a clear legal right to the relief sought by her Article 78 Petition seeking to restrain further prosecution of jurisdictionally-void disciplinary proceedings, based on charges legally insufficient as a matter of law, not even rising to the level of disciplinary jurisdiction[4]. In Dobler v. Kaplan, 27 Misc.2d 15, 211 N.Y.S.2d 96 (1961), prohibition was held to be "an appropriate remedy" to prevent a disciplinary proceeding where a judicial or quasi-judicial body is acting or threatening to act without or in excess of its jurisdiction, citing Pierne v. Valentine, 179 Misc. 114, 37 N.Y.S.2d 519, reversed 266 App.Div. 70, 42 N.Y.S. 404, modified

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[4] Such fact was detailed in Appellant's Cross-Motion (at pp. 20-23) wherein she showed that the charges forming the basis for the February 6, 1990 Petition, arising out of two fee disputes, do not state a cause of action, inter alia, being pleaded entirely on information and belief and making no allegation showing scienter. The lack of any allegation and showing of intent to engage in acts of professional misconduct vitiates the February 6, 1990 Petition, as well as the two later Petitions. Matter of Altomerianos, 160 A.D.2d 96, 559 N.Y.S.2d 712.

291 N.Y. 333, 52 N.E.2d 890 (1943). In Dobler, the court relevantly stated:

> "If the petitioners here are charged with no wrongdoing the Commission would have no jurisdiction to proceed. See People ex rel. Sandman v. Tuthill, 79 App.Div. 24, 79 N.Y.S. 905... In view of the fact that the petitioners might suffer irreparable harm if they are compelled to defend themselves against the charges if, as a matter of law, they cannot be held to answer them, I find the remedy herein sought a proper method of challenging in advance the jurisdiction of the Commission to proceed." (at p.99).

Prohibition has also long been recognized by this Court as "a more effective remedy" to prevent protracted hearings in a proceeding in which any adverse order would ultimately be open to attack on jurisdictional grounds and needlessly subject innocent parties to massive and unwarranted expense. Culver Contracting Corp. v. Humphrey, 268 N.Y. 26, 196 N.E. 627 (1935). This is clearly the case at bar. Quite apart from the enormous financial cost that Appellant has been caused to endure, the record here leaves no doubt as to the utter profligacy with which Respondent Second Department has expended huge sums of taxpayers' money and diverted precious court resources to maintain and perpetuate disciplinary proceedings it knows to be jurisdictionally void. This Court has approved prohibition to prevent a multiplicity of void proceedings. Dondi v. Jones, 40 N.Y.2d 8, 386 N.Y.S.2d 4, 351 N.E.2d 650 (1976).

12. In granting the dismissal motion made by their own attorney, the Attorney General, under CPLR §3211(a)(7),

Respondent Second Department disregarded the controlling legal standard on a motion to dismiss, as set forth by this Court in Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275; 401 N.Y.S.2d 182 (1977), as well as its own prior decisional law, De Paoli v. Board of Education 92 A.D.2d 894, 459 N.Y.S.2d 883 (2d Dept. 1983), which required Appellant's factual allegations, and all reasonable inferences therefrom, to be accepted as true for purposes of the motion.

Appellant's Article 78 Petition clearly alleged (at paragraph "ELEVENTH") that Respondent Referee was refusing to address jurisdictional issues raised by Appellant (Exhibit "E-1") and (at paragraph "FIFTEENTH") that "Petitioner has no adequate remedy except by a judgment as applied for herein" (Exhibit "E-2"). These allegations were then amplified and documented[5] in Appellant's Cross-Motion, seeking summary judgment under CPLR 3211(c), as well as leave to amend or supplement the Article 78 Petition "so as to plead a pattern and course of harassing and abusive conduct" by Respondents, including Respondent Second Department, whose decisions and orders the Cross-Motion described as:

> "evidenc[ing] a pattern of disregard for black-letter law and standards of adjudication--particularly as to threshold jurisdictional issues." (¶22 of Appellant's Affidavit in support of Cross-Motion, annexed hereto as Exhibit "F-2")

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5 Such documentation included stenographic transcripts--excerpts from which were incorporated into the body of Appellant's July 2, 1993 Affidavit in support of her Cross-Motion (Exhibit "F-1).

The Cross-Motion specifically identified Appellant's:

> "June 18, 1992 Motion to Dismiss the February 6, 1990 Petition on jurisdictional and other grounds, which the Court denied, without reasons, by Order dated November 12, 1992[6]..., although controlling law mandated the vacatur relief sought...". (¶22 of Appellant's Affidavit in support Cross-Motion, annexed hereto as Exhibit "F-2")

13. Consequently, dismissal by a Judgment holding that Appellant's jurisdictional challenge could be "addressed in the underlying disciplinary proceeding or in a motion to confirm or disaffirm a referee's report" (Exhibit "A") not only disregarded the controlling legal standard on a motion to dismiss, but was contradicted by the factual record documenting that Respondent Referee and Respondent Second Department were, respectively, refusing to address and follow the law as to jurisdiction in the "underlying disciplinary proceeding".

14. Events subsequent to the Judgment have further borne out the inadequacy of a direct remedy within the "underlying disciplinary proceeding". Notwithstanding the Judgment's finding that Appellant's jurisdictional challenge could be addressed therein, Respondent Referee has maintained his refusal to permit any proof on jurisdictional issues and has subjected Appellant to four days of hearings on the February 6, 1990 disciplinary Petition, devoid of the most rudimentary due

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6 Said Order is annexed hereto as Exhibit "D-14".

process[7].

15. Appellant will move to incorporate into the record before this Court documents relating to the foregoing subsequent events, including the transcripts of the uncompleted hearings on the February 6, 1990 Petition. The deliberate and sadistic abuse of power by Respondents Referee and Casella at those hearings, denying Appellant any semblance of due process, provide a separate and additional basis for this Court's jurisdiction to grant Article 78 relief. In La Rocca v. Lane, 37 N.Y.2d 575 (1975), this Court recognized prohibition as "a more complete and efficacious remedy" than appeal to protect the overriding right to a fair and impartial trial as "a paramount constitutional condition in any judicial proceeding", at 582-3 (per Breitel, J., Chief Judge)

16. In Williams v. Cornelius, 76 N.Y. 2d 542, 561 N.Y.S.2d 701 (1990), this Court (per Bellacosa, J.) ruled that

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[7] At the first three days of hearings on the February 6, 1990 Petition, held immediately following release of the September 20, 1993 Judgment, Respondent Referee: (a) refused to require Respondent Casella to prove the contested jurisdictional allegations of the February 6, 1990 Petition before proceeding with the charges pleaded therein; and (b) refused to permit Appellant to show by evidentiary proof that there was no jurisdiction to proceed.

Thereafter, with knowledge of such conduct by Respondent Referee, Respondent Second Department refused to stay, even temporarily, continued hearings on the February 6, 1990 Petition. Such refusal also knowingly disregarded the pendency of Appellant's dismissal/summary judgment motion dated November 19, 1993 before Respondent Second Department--constituting yet another jurisdictional challenge by her in the "underlying disciplinary proceeding"--and the fact that Appellant was taking an appeal to this Court from the September 20, 1993 Judgment.

prohibition is appropriate where the harm caused is of a substantial and irreparable nature "a continuing blot on her record and reputation" (at 703). This case squarely meets that standard. Appellant has suffered, and continues to suffer, grievous reputational and economic injury by Respondents' anarchical acts, including its ongoing denial of vacatur or a hearing on the June 14, 1991 interim suspension Order (Exhibit "D-6")[8]--unlawfully depriving her for more than two and a half years of her right to earn a livelihood by practicing her profession.

17. Article 78 relief is further supported by Matter of Holtzman v. Goldman, 71 N.Y.2d 564 (1988)--ironically, the sole authority cited by Respondent Second Department to justify its dismissal. In Holtzman, this Court granted Article 78 relief, reaffirming resort to such remedy where a court "acts or threatens to act without jurisdiction or in excess of its authorized powers". Holtzman further reiterated that prohibition lies--even where subject matter jurisdiction exists--when "abuses of power...impact upon the entire proceeding as distinguished from an error in a proceeding itself proper". Id., at p. 570. The case at bar more than satisfies the Holtzman criteria.

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[8] It must be noted that the hearings on the February 6, 1990 Petition are unrelated to the June 14, 1991 interim suspension Order (Exhibit "D-6). Indeed, Respondent Casella successfully blocked attempts by Appellant to elicit proof as to the invalidity of the interim suspension Order, asserting same to be "irrelevant" to the February 6, 1990 Petition.

Appellant's Article 78 Petition and her Affidavit in opposition to Respondents' dismissal motion and in support of her Cross-Motion alleged and documented that Respondents had knowingly and vindictively initiated and maintained disciplinary proceedings against her, which were devoid of jurisdiction for non-compliance with statutory and rule prerequisites, specified in Judiciary Law §90 and 22 NYCRR §691.4(e)(f) and (h), and had engaged in a campaign of retaliatory harassment against her, including a legally and factually baseless and jurisdictionally-void interim suspension of Appellant from the practice of law.

18. Appellant's Cross-Motion showed the maliciousness of Respondent Second Department's Orders, in particular, its June 14, 1991 interim suspension Order (Exhibit "D-6"), which, without any hearing, suspended Appellant immediately, indefinitely, and <u>unconditionally</u>[9]. Said Order made no findings and stated no

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[9] The fact that the June 14, 1991 Order (Exhibit "D-6") is "unconditional" was one of the grounds upon which Appellant, on July 19, 1991, moved before this Court for leave to appeal, of which this Court is asked to take judicial notice. As stated in that motion:

> "[The Order] does not require or provide for any further act on her part, nor does it contemplate any further proceedings before the Second Department. Nor is the order conditional in any way--<u>e.g.</u>, that the suspension will be lifted upon undergoing a medical exam, or upon a determination by the court that she is not incapacitated, or upon completion of the unrelated pending disciplinary proceeding. The order is as final as any other suspension order that finally determines a disciplinary proceeding, whether denoted as an 'indefinite' suspension or a suspension for a definite term. When there is nothing more for any party or the court to do, as here, the order is final. <u>See</u>, CPLR §5611." (at ¶29 of the Supporting Affirmation of

reasons[10], in disregard of this Court's preclusion of finding-less interim suspension orders in Matter of Nuey, 61 N.Y.2d 513, 474 N.Y.S.2d 714 (1984), reaffirmed in Matter of Russakoff, 72 N.Y.2d 520, 583 N.Y.S.2d 949 (1992).

19. Appellant incorporated in her Cross-Motion the disciplinary file under A.D. #90-00315. That file establishes that her right to vacatur of her interim suspension Order (Exhibit "D-6") is in all respects a fortiori to Russakoff's and, further, that Respondent Second Department has deliberately disregarded this Court's indication in Russakoff, supra, at 950-51, that corrective action is necessary to provide a prompt suspension hearing where an interim suspension order does not do so, citing Barry v. Barchi, 443 U.S. 55, 66-68, 99 S.Ct. 2642, 2650-51 (1979); Gershenfeld v. Justices of Supreme Court., 641 F. Supp. 1419 (1989).

Appellant's then counsel, David B. Goldstein, Esq.)

This Court denied the motion on September 10, 1991. (Mo. No. 890)

[10] The June 14, 1991 interim suspension Order (Exhibit "D-6") states only the Grievance Committee had moved for Appellant's indefinite suspension based on her "failure to comply" with Respondent Second Department's October 18, 1990 Order (Exhibit "D-2")--without making any findings on the subject. Indeed, Appellant's opposing papers and the record before Respondent Second Department established not only that Petitioner's motion to suspend Appellant--unsupported by any petition--was jurisdictionally void and factually baseless, but that the October 18, 1990 Order (Exhibit "D-2") contained at least seven pivotal errors--five of which were designed to cover-up the fact that there was neither personal nor subject matter jurisdiction for the October 18, 1990 Order, with the two additional errors palpably prejudicial to Appellant's rights under §691.13(b)(1).

On July 31, 1992, Respondent Second Department denied (Exhibit "D-12"), without reasons, Appellant's June 16, 1992 motion to vacate its June 14, 1991 interim suspension Order (Exhibit "D-6") based on Russakoff[11]. Additionally, it denied Appellant a post-suspension hearing as to the alleged basis of her interim suspension.

Appellant's Cross-Motion (at p. 8) described that when

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[11] Appellant sought to appeal Respondent Second Department's July 31, 1992 Order (Exhibit "D-12") and filed an appeal to this Court on September 3, 1992. Her June 16, 1992 motion to vacate was annexed as Exhibit "B" to her October 14, 1992 Affidavit in Support of Jurisdiction for Appeal as of Right, of which this Court is asked to take judicial notice. In addition to the constitutional issues raised in her October 14, 1992 supporting Affidavit, Appellant directed this Court's attention to:

> 'the irreparable injury resulting when a lawyer is stigmatized by suspension of the license to practice law, albeit the suspension is characterized as an "interim" one. Such injury fully meets the test of finality, which is "....whether irreparable injury is done if the decision is wrong." Cohen & Karger, The Powers of the Court of Appeals, §9, at p.32 (1952 ed.)." (at fn. 1, pp. 1-2)

She further stated:

> "...the Appellate Division's failure to direct a post-suspension dispositional hearing in its July 31, 1992 order shows that the Appellate Division itself, as well as the Grievance Committee, viewed the June 13, 1991 suspension order as 'final' in the jurisdictional sense, requiring no further action on the Court's part." (at fn. 1, p. 2)

On November 18, 1992, this Court dismissed Appellant's appeal on the ground that "the order appealed from does not finally determine the proceeding within the meaning of the Constitution." (Mo. No. 1208 SSD 99)

she moved for reargument, renewal, and reconsideration[12] of Respondent Second Department's November 12, 1992 Order (Exhibit "D-13), which, sua sponte imposed maximum $100 statutory costs on her for having made her June 16, 1992 vacate motion, she documentarily established Respondent Second Department's invidious treatment of her. She did this by comparing her interim suspension with that of "20 other temporarily suspended attorneys" in the Second Department[13]. She found that "all of them had received a final order for purposes of appellate review, including a hearing unless waived", but that she alone had been denied a post-suspension hearing--although repeatedly requested. Appellant stated:

> "Because of the lack of a final disposition..., I have been denied an appeal to the Court of Appeals, both as of right and as a leave application." (Exhibit "H", p. 4)

As set forth in her Cross-Motion (at p. 9), the result of Appellant's uncontroverted documentary presentation of disparate and discriminatory treatment--never presented as part of her original vacate motion--was an Order by Respondent Second Department describing her hearing requests as "duplicative and frivolous", "warrant[ing] the imposition of a further bill of costs in the sum of $100." (Exhibit "D-17").

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[12] Appellant's December 14, 1992 Motion for Reargument, Renewal, and Reconsideration is annexed hereto as Exhibit "G". Her March 8, 1993 Supplemental Affidavit in support thereof is annexed as Exhibit "H".

[13] The list of said 20 attorneys appears at Exhibit "C" to Appellant's March 8, 1993 Supplemental Affidavit, annexed hereto as Exhibit "H").

20. The record shows unmistakably that Respondent Second Department is deliberately and maliciously perpetuating Appellant's interim suspension--now in its third year--by refusing to accord her a post-suspension hearing and that it has it within its power to keep her "temporarily suspended" for the rest of her life. Under such circumstances, the lack of provision for a prompt post-suspension hearing makes review by this Court essential so that it can now reach the question it deferred in Russakoff, supra, at 950, in the expectation that the Second Department would take appropriate curative action. This case establishes that the time is overdue to declare such open-ended interim suspension orders and the Second Department's Rules permitting same to be unconstitutional[14].

21. Under Judiciary Law §90(8), an attorney convicted in a disciplinary proceeding has "the right to appeal to the court of appeals from a final order of an appellate division in such proceeding upon questions of law involved therein...".

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[14] It may be noted that when, as hereinabove described (fn. 11), Appellant sought to appeal to this Court from Respondent Second Department's July 31, 1992 Order (Exhibit "D-12"), she raised precisely that issue in her September 3, 1992 Jurisdictional Statement:

> "Whether an interim suspension of an attorney is violative of constitutional rights where there was no hearing before or after the interim suspension, which occurred more than a year ago--an issue expressly not reached by Russakoff." (at Point III) (emphasis in the original)

Appellant has now been suspended more than 2-1/2 years without any hearing having been held by Respondent Second Department.

(emphasis added). In view of the record showing that Respondents have acted in concert to render such statutory right nugatory, immediate review by this Court of this Article 78 proceeding is additionally mandated.

22. Respondent Second Department's denial of Appellant's Cross-Motion is insupportable in law or fact. The record before it showed that Appellant was entitled to every item of relief requested. This included summary judgment in her favor, since there was no probative evidence whatever submitted by Respondents in opposition or in support of their own dismissal motion, which rested entirely on their attorney's affirmation, and Respondents did not controvert Appellant's documentary showing[15]. Indeed, the Attorney General, who made no claim to have read--or to be familiar with--the disciplinary file under A.D. #90-00315, did not refute Appellant's specific allegations (Exhibit "F-2", ¶ 22) that such files:

> "show a long-standing pattern of knowing and deliberate misuse of disciplinary power by [Respondent Second] Department, reflected in vindictive decisions which fly in the face of the factual record and black-letter law." (Appellant's July 19, 1993 Affidavit in Further Opposition to Respondents' Dismissal Motion and in Further Support of her Omnibus Cross-Motion, ¶ 15)

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[15] See, Appellant's July 19, 1993 Affidavit in Further Opposition to Respondents' Dismissal Motion and in Further Support of her Omnibus Cross-Motion, inter alia, ¶ 16.

As pointed out by Appellant's papers[16], she was, therefore, entitled to summary judgment based on the uncontroverted evidence presented by her. It is an error of law to refuse to find a fact established by uncontroverted evidence. Andrassy v. Mooney, 262 N.Y. 368 (1933); Kaltner v. Kaltner, 268 N.Y. 293, 197 N.E. 287 (1935). As in Kaltner, supra,

> "the action of the [lower court] in refusing to grant judgment in favor of the plaintiff and in refusing to make findings of fact upon questions conclusively established constitutes reversible error", at 293.

23. This appeal, therefore, raises profound issues of constitutional importance, involving blatantly lawless conduct by justices of Respondent Second Department, as well as by its at-will appointees--the named Respondents herein. What is here alleged--and resoundingly documented by the record under A.D. #90-00315--is not one isolated act, but rather an on-going pattern of retaliatory and vindictive behavior, wherein Respondents have knowingly and wilfully authorized, acquiesced, and participated in jurisdictionally-void disciplinary proceedings and in the procurement and perpetuation of a jurisdictionally-void and factually baseless interim suspension of Appellant.

24. It is because Article 78 relief was foreseeable if

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[16] See, Appellant's July 19, 1993 Affidavit in Further Opposition to Respondents' Dismissal Motion and in Further Support of Omnibus Cross-Motion, inter alia, ¶ 32; Appellant's Memorandum of Law, Point V, at p. 11-13.

Appellant obtained review by an impartial tribunal that Respondent Second Department denied her request for recusal and transfer. It thereupon instructed, authorized, and/or permitted its attorney, the Attorney-General--acting also on behalf of the other named Respondents--to file a factually false and legally insufficient motion to dismiss the Article 78 proceeding against it, which motion it then granted by disregarding the legal standard of adjudication applicable to such motion.

25. Consequently, Respondents have not only corrupted the judicial process connected with the underlying disciplinary proceedings, but also the statutory vehicle which has replaced the "'ancient and just writ' of prohibition...rooted deep in the common law" to review the kind of "gross, unprecedented, and...suspect" usurpation of power as here at bar. La Rocca v. Lane, supra. at p. 581.

26. When charges of such extraordinary gravity are made against members of the judiciary who sit on the second highest court of our State, to wit, that they are misusing their office to engage in a vendetta to destroy an attorney's livelihood and good name[17], review by this Court is not only

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[17] As alleged at Paragraph "THIRD" of the Article 78 Petitioner, at all times prior to initiation of disciplinary proceedings under the February 6, 1990 Petition, Appellant, who was licensed to practice law in 1955, was:

> "a member of the bar in good standing and had never been disciplined or found guilty of any ethical violation."

vital to its appellate function, but to its supervisory function. Such function is essential if this Court is to safeguard the integrity of our court system--plainly necessary where the appeal presented is from a Judgment dismissing an Article 78 proceeding rendered by the accused judges themselves.

27. In support of review and reversal by this Court, Appellant will urge, on points of law, the following points--all raising substantial constitutional questions:

POINT I: RESPONDENT SECOND DEPARTMENT'S APPARENT AND ACTUAL BIAS

Respondent Second Department violated Appellant's right to a fair and impartial tribunal by refusing to recuse itself from an Article 78 proceeding for apparent and actual bias.

A. Apparent bias resulted from its participation in an Article 78 proceeding in which it was personally involved as a named party, where its own conduct was being directly challenged as fraudulent and criminal.

B. Actual bias was demonstrated by its dismissal of the Article 78 proceeding on the ground that Appellant's "jurisdictional challenge" could be addressed in the "underlying disciplinary proceeding"--which finding disregarded:

   (1) the pleaded allegations of the Petition, which had to be deemed admitted for the purposes of a dismissal motion under CPLR §3211(a)(7); and

   (2) the evidentiary showing presented by Appellant in opposition to Respondents' motion to dismiss and in support of her Cross-Motion, establishing that direct relief in the "underlying disciplinary proceeding" was unavailable and inadequate--which fact was uncontroverted by any party with personal knowledge.

C. Actual bias was demonstrated by its denial of Appellant's Cross-Motion for summary judgment in her favor under CPLR §3211(c), to which her uncontroverted documentary showing entitled her, and by its sua sponte granting of summary judgment to Respondents by dismissal of the Article 78 proceeding "on the merits", notwithstanding same was unsupported by any affidavit of a party with personal knowledge and was without notice to Appellant, contrary to CPLR §3211(e).

D. Actual bias was demonstrated by its denial of Appellant's Cross-Motion to compel production, inter alia, of the July 31, 1989 Grievance Committee report on which the February 6, 1990 disciplinary Petition was allegedly based--which report the Attorney General had placed in issue in his dismissal motion by representing that it supported jurisdiction, without stating that he had personally read it and without annexing a copy to his motion papers.

E. Actual bias was demonstrated by its denial of Appellant's Cross-Motion for a stay of prosecution under the three disciplinary Petitions, all under A.D. #90-00315, pending final disposition of this Article 78 proceeding, where a decision in Appellant's favor on her jurisdictional challenge would render all disciplinary proceedings brought thereunder void and where there was no prejudice to the public since Appellant was already suspended pursuant to Respondent Second Department's June 14, 1991 interim Order of suspension.

F. Actual bias was demonstrated by its denial of Appellant's Cross-Motion for leave to amend or supplement the Article 78 Petition "so as to plead a pattern and course of harassing and abusive conduct by Respondents, acting without or in excess of jurisdiction", including the procurement and perpetuation of the June 14, 1991 interim suspension, where:

(1) CPLR §3025(b) requires that such "leave be freely given", and was further authorized by Appellant's compliance with CPLR §3025(b);

(2) the evidentiary record fully documented the prospective allegations as true, and such allegations were entirely uncontroverted.

G. Actual bias was demonstrated by its denial of Appellant's Cross-Motion for sanctions against Respondent's attorney, the Attorney General, for papers which Appellant documented to be factually false, deceitful, legally insufficient, and meeting the standard for an award under 22 NYCRR 130-1.1 et seq.

POINT II

A. Actual bias was shown by Respondent Second Department's deliberate refusal to vacate Appellant's finding-less interim suspension Order, with knowledge that such vacatur was required by this Court's decisions in Matter of Nuey, 61 N.Y.S.2d 513 (1984) and Matter of Russakoff, 72 N.Y.2d 520, 583 N.Y.S.2d 949 (1992) and its refusal to direct an immediate post-suspension hearing, thereby knowingly preventing her from obtaining an appealable final order. Such bias required Respondent Second Department's disqualification from the Article 78 proceeding.

B. Respondent Second Department's refusal to direct a prompt post-suspension hearing to determine the jurisdictional, factual and legal basis of Appellant's interim suspension Order for more than 31 months since her suspension requires vacatur of that Order. Such open-ended orders and court rules authorizing them must be declared unconstitutional as a matter of law.

POINT III

Respondent Second Department unconstitutionally deprived Appellant of her right to an unbiased hearing officer, Respondent Referee being an at-will, per diem paid appointee of Respondent Second Department, whose direct financial self-interest is served by not addressing Appellant's dispositive jurisdictional challenge, which would obviate hearings on the substantive charges of professional misconduct.

Dated: White Plains, New York
January 24, 1994

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